IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,	)	
Plaintiff,	)	Circuit Court
vs.	)	Case No. 0002-01376
PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon corporation,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
Volume 43-A

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Roosevelt Robinson, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at 8:40 a.m., Tuesday, March 12, 2002.

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APPEARANCES:

Mr. D. Lawrence Wobbrock, Attorney at Law,
Mr. Charles S. Tauman, Attorney at Law,
Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;

Mr. James L. Dumas, Attorney at Law,
Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of Defendant
Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated.

ALSO PRESENT:

Mr. Herbert Pallant

* * *

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MORNING SESSION
Tuesday, March 12, 2002
8:40 a.m.

(Court was reconvened at 8:40 a.m.)

THE COURT: Good morning.
MR. WOBBROCK: Good morning, Your Honor.
THE COURT: Down one juror at the moment. One juror down.
All right.
MR. PHILLIPS: We can talk a little bit while we're waiting, Your Honor --
THE COURT: Let's do so.
MR. PHILLIPS: -- about the schedule, if you would like.
THE COURT: All right. Scheduling.
MR. TAUMAN: Or the NCAA playoffs, or anything else.
MR. PHILLIPS: That I would much prefer talking about. But let's talk about scheduling.
THE COURT: Well, the NCA playoffs are much more problematical. Let's leave that alone.
MR. PHILLIPS: We can keep the trial going for another couple weeks and start a pool, if you like,

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Your Honor.

MR. DUMAS: That's illegal under Oregon law.

THE COURT: That certainly is. Thanks, Mr. Dumas, for saving us -- getting us out of that one.

MR. PHILLIPS: We are not going to put on Dr. May. We told plaintiff that this morning. So after Dr. Larsen, we will be through with live witnesses.

There are some additional exhibits that we need to address for the Court, some of which were the Carchman exhibits. That should be quick.

But there are some other documents, some excerpts from some CTR annual reports that I want to get in, and then some additional exhibits that we'll need to talk to the Court about, either today or more likely tomorrow morning.

As I understand it, plaintiff has a brief rebuttal case that they believe will be done, put on and off this afternoon. That will leave the Court with the two points that I think would be required to be resolved before we go to closing argument: Final exhibit admission issues and jury instructions, which we need to settle. And depending on the speed with which that can be done, openings -- or, rather -- closings could begin on Wednesday afternoon or, depending again on the time, Thursday morning, Your Honor.

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THE COURT: Sounds good.
MR. DUMAS: Your Honor, remind me -- maybe I'm the only one that doesn't remember -- did Your Honor address the issue of whether you were going to instruct the jury prior to opening -- prior to closing?
MR. TAUMAN: It's in the case management order.
MR. DUMAS: Yeah, I recall it was in there.
THE COURT: I thought I said no.
MR. TAUMAN: No, you said "yes".
MR. DUMAS: I thought you --
MR. WOBBROCK: You said "yes".
THE COURT: I said yes?
MR. DUMAS: I remember you were not inclined to do that.
THE COURT: I said I was going to instruct them before closing?
MR. WOBBROCK: Right.
MR. DUMAS: Yeah.
MR. WOBBROCK: But you have discretion to change your mind.
THE COURT: Who pushed me into that situation?
MR. DUMAS: The plaintiff did, Your Honor -- oh, I'm just kidding. I don't know.
THE COURT: Instructing before closing? And then instruct them again?

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MR. PHILLIPS: No, no --
MR. DUMAS: No, just once.
MR. PHILLIPS: Just once. And I believe the order also indicates that the transcript of your instructions would be taken by the jury into the jury room.
THE COURT: Well, I'll tell you about the instructions, not a transcript.
MR. PHILLIPS: Maybe even better. Who knows how it gets transcribed.
No offense.
THE COURT: I prefer to instruct the jury -- I prefer to sit down and listen to counsel make the arguments and then give my -- you my instructions.
If I did that, I'm going to -- I'm going to do an about face and indicate that the order should be amended. The Court has changed its mind. It will not give jury instructions before closing arguments --
MR. DUMAS: Okay.
THE COURT: -- but after.
And the reason, it's sort of traditional with me, really. When I give the law of the case, that's the last thing I want the jury to hear. I don't want to give them the law of the case and then have them hear the attorneys tell them what the law of the case is. I want to have the final word: This is the law that's

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applicable to this case. People have a tendency to go with that which they hear last. No matter where it comes from, they generally go with the last person they hear speak. So I would rather go after the closing arguments.

So you're not -- it doesn't appear to be a problem for you because both of you already know what instructions I am going to give. So you can say: The Court is going to give this instruction, the Court is going to give this instruction.

MR. PHILLIPS: All right.

THE COURT: And listen closely to the Court when he gives this instruction. But, now, if you don't didn't know what I was going to give, that would be a problem.

MR. PHILLIPS: That would be troublesome.

THE COURT: That would be troublesome.

MR. PHILLIPS: That would be my only concern. As long as we know what your instructions are, we can infer accurately what your instructions are.

THE COURT: Right. You can have your copy, they can have their copy, and the Court would have its copy once we go through them, once we get through that.

MR. PHILLIPS: Right.

THE COURT: These are the instructions that the

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Court is going to give. Everybody would have a copy of those instructions. So you can -- you can then -- then you can read those into your argument.

MR. PHILLIPS: Very good.

MR. DUMAS: Judge, you know, as you know, some -- some judges in this courthouse make a distinction between saying the Court is going to instruct you basically such and such and such and such, listen carefully to the Court's instructions, as opposed to: This is the instruction the Court will give you. And then someone stands up and reads an instruction.

MR. WOBBROCK: Your Honor, can we stop this now and go ahead because I know the doctor has got to get going. The jurors are here now.

THE COURT: Bring the jury. I don't want people reading. I want you guys to use your good minds and remember what the law is. Now, me, I have to read.

(Jury entered the courtroom at 8:41 a.m.)

THE COURT: Good morning, members of the jury. Thanks for coming in early. We have a witness we need to get off because he needs to be in another county later today, so we need to get started.

Counsel, you may begin with your cross-examination.

MR. WOBBROCK: Thank you, Your Honor.

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CROSS-EXAMINATION

BY MR. WOBBROCK:

Q Good morning, Dr. Larsen.

A Good morning.

Q Dr. Larsen, this is not the first time you've agreed to work with Mr. Dumas on a Philip Morris case, is it, sir?

A That's correct.

Q And you got the medical records in this case that -- I don't know if you could tell by looking at them, but they were provided to us by the defendants. There was no efforts -- nobody is trying to hide anything in this case. You would agree with that?

A I agree.

Q And you looked at these materials yourself, you testified to, correct?

A Correct.

Q And did you have any help?

A Help?

Q Yeah. Looking at the materials.

A No, I looked at them personally.

Q I notice that you put down on your time records you had spent two and a half hours looking at these materials, "case review" it said; is that correct?

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A On one occasion, yes.
Q And then it said 3.75 hours with a case conference.
A Correct.
Q So you had a total of six and a quarter hours in the case?
A Oh, no, there's considerable more hours than that.
Q Okay. That's the only bill I saw. How many more hours have you got?
A I billed for approximately 22 to 25 hours, and I suspect there will be another 20 hours total.
Q I see, okay.
How much do you bill an hour, sir?
A 150 an hour.
Q Okay. So you looked at things like the depositions and the medical records and even some trial testimony, is that correct?
A That's correct.
Q And you tried to relate to the jury your conclusions based upon the materials you gave -- you looked at?
A Yes.
Q Trying to give them a complete view of everything.
A Not a complete view. There were volumes of medical records we didn't discuss on this.

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Q But in considering the facts of the case, you took the time to read the deposition of the family?
A I did.
Q But you really only told the jury part of what you looked at, didn't you, Doctor?
A Yes.
Q You didn't tell them, for example, that Richard Schwarz, the husband, said that his wife continued to smoke from September to either December or February of '98. You didn't tell them that part, did you, sir?
A No, I was not asked that question.
Q Okay. But you told them the history of her smoking, but you left out the person she lived with and what he thought about the history of her smoking?
A Yes. I was not asked that question. That's true.
Q Okay. So you only told them the point of view as indicated from the medical records, not from what personal observers who lived with Michelle Schwarz saw, correct, sir?
A That's correct, if I can explain. The report from Dr. Schwarz was that she didn't quit smoking. Now, I don't know, since she did not smoke around him, I don't know if that meant she smoked on rare occasion or not. So I have to rely on what I see in the medical records. And certainly he knows her better than I ever could from medical records. But, again, we see consistent reports by other physicians

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about her stop-smoking episodes.

Q When you say she never smoked around him, where do you get that information?

A In the deposition and/or the trial testimony, there were reports that the doctor asked her not to smoke in the house, to not smoke at the office, to not smoke in his car. And I assume, since he said it was a nasty habit, that he did not engage with her at a time when she smoked.

Q But if she would excuse herself in a movie and go out and smoke and then come back smelling like a cigarette, or excuse herself after dinner and go out outside and smoke a cigarette or out in the garage, or if she would get up in the middle of the night and wake him up and have a cigarette, as he testified that she would do, or if she would go out and get the newspaper in the morning and have a cigarette first thing in the morning, or if she would have a cigarette right after breakfast and he was there, he would know that, wouldn't he?

A Yes, he would.

Q So if she never quit from September to February, or September to December of '97 to February of '98, he would be the person to know best about that, wouldn't he?

A I'm sure that he would know much more intimately than I could from reading the medical records. But, again, I have to rely on what I have read from other physicians.

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Q On page 43 of his deposition, he said that, and on page 77 of his deposition, he said she was never able to quit. Did you notice that?
A Yes, I did.
Q Yet you decided for whatever reasons to not tell the jury about those facts; correct, sir?
A Correct.
Q Did you note that Dr. Schwarz said that his wife felt embarrassed because she smoked?
A Yes.
Q If she felt embarrassed and she wished she didn't smoke, and she had two sons that are telling her not to smoke, and a doctor husband that was telling her not to smoke, do you think it's likely she would under report her smoking habits when she would see a doctor?
A I certainly think that's possible. But, again, we see reports from a number of physicians where she reported that she quit.
Q And did you see in the records also that she -- the deposition of her son, Michael, that he observed her and her mother -- in other words, Michael's grandmother, a lady by the name of Shirley Chuck-Dye -- did you see in there that Michael said that he often saw Grandma, or Shirley, and mother talking about quitting smoking?
A Yes, I did.

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Q Now, when you looked these records, Doctor, and you spent 22 some hours that you said you had, you looked at these much more intensely for purposes of litigation than you would if you had been having her as a patient, would you not?

A Um, I rely on medical records, and I tend to read all of the medical records, whether it's a private patient or a clinic patient, and I rely on records regularly to decide upon how to treat a patient.

Q But when you get a patient that comes to you and says I want to stop whatever I'm doing -- let's assume it's cigarette smoking -- you don't order 25 years of medical records, do you?

A No. I ask for release of information, and I have to get a list of prescribing doctors and clinics and hospitals, and I request those records.

Q But you don't get 25 years routinely, do you, sir?

A Rarely.

Q And, in fact, you would agree, would you not, that Mrs. Schwarz's medical history has been put under a microscope by Philip Morris in this case?

A Yes, it has.

Q Doctor, you testified yesterday -- and I'm just going to read -- I got the transcript overnight -- said: Given the amount she smoked for the duration and absence of

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any significant impairment in her social life, I would determine this to be a mild addiction.

Do you remember giving that testimony?

A Yes, I do.

Q Is it your testimony that unless she has significant impairment of her social life, she's not severely addicted?

A Not just on that basis, no.

Q Okay.

You're familiar with the DSM IV?

A I am.

Q Well familiar with it, probably.

A I am.

Q You're going to go to another courtroom this afternoon and testify in another county. Are you going to use the DSM IV in that case?

A Yes, I will.

Q So in the DSM IV, did you run her smoking habits and characteristics in this in that criteria?

A Yes.

Q In this case?

A Yes.

Q Then you would agree with Dr. Benowitz of the six or seven -- it's a little bit unclear -- criteria to determine whether or not someone is addicted, she meets five

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or six of those?
A Oh, I agree that she is addicted, yes.
Q And she meets five or six of those criteria out of the six or seven, would you agree?
A Well, I think that's accurate.
Q Okay. All right, sir, we won -- we've got a point of agreement there, then?
A Right.
Q But you also said, I believe -- and I just want to make sure you didn't misstate yourself, sir, because I think we have a disagreement about something here if, in fact, you did say it and you meant it.
And she made the personal choice, the motivation to quit to do the things necessary in order to stop smoking -- and if she made the personal choice to quit and do the things necessary in order to stop smoking, she would have been able to do so. That's again reinformed by two periods where she was able to quit smoking for seven or eight months.
Now, you don't mean that she stopped smoking on two different occasions for seven or eight months, do you, sir?
A No.
Q You mean -- and if you said that, that would be misleading, wouldn't it?

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A If I said that, it was as far as the number of months, perhaps, mistaken, yes.

Q All right. So I want to you assume something is true. It's a little thing that I have prepared. But it shows here -- and I want you just to assume this is true -- but I think you'll find -- and I'll just ask you if this comports with your observation.

Dr. Whitman -- this is the Bate numbers of the records here -- Dr. Whitman noted she stopped smoking 9/24/97, so that's the end of September, would you agree, sir?

A Yes, I would.

Q And then she resumed at 2/3/98. So that's just a little more than four months she was able to stop?

A Yes, that's what his note depicts.

Q Right. And that's -- when you say seven or eight months, you didn't mean seven or eight months twice, you meant four months once and maybe four months again, correct?

A No, it's my understanding of the medical record that she reported that she stopped in July of '97, not September. And then resumed, perhaps, in late December or sometime during that -- the end of that year.

Q Right. In fact, if you look at the next entry here, sir, of Dr. Williamson, he said she stopped in July, but she started in December. So that's a little --

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depending on when she stopped in July, that's about five months. So these are different reportings of when she stopped, these two periods, to different doctors, somewhere around four to five month period, but different dates as she reported to different doctors, correct, sir?

A That's correct.

Q Okay. And, in fact, when she did stop again, and you -- you reported she had a -- well, let's go back, just so nobody is confused here.

Whatever this refers to, this four month period or five month period, this is one period of stopping smoking. It's just different dates for that same period, correct, sir?

A I assume so.

Q Now, the second one that you mentioned, the second time she stopped smoking, was after she had been diagnosed, correct?

A Yes.

Q And she had had her head cut open and a chunk of tumor taken out of her brain, correct?

A Correct.

Q And she had had radiation and chemotherapy, correct?

A Correct.

Q And she was under a lot of drugs, she got steroids

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and so her face bloated up and her hair fell out, okay?
A Yes.
Q Pretty tough time for her, right?
A Very difficult.
Q And she's on oxygen part of that time?
A Yes.
Q A lot of incentive to quit smoking when all that is going on, isn't it?
A I would assume so.
Q Yeah.
And when you evaluate her quit attempts and the number of times that she quits, did you look at the -- I don't know what part of the transcript you necessarily looked at -- but did you look at this set of facts that were related to the witnesses -- and I'm going to read it to you. This was testimony given to Dr. Benowitz:
She made attempt in the late 1960s after her husband quit.
That comforts with what you understand, is that correct?
A Correct.
MR. PHILLIPS: Excuse me, this is testimony of whom --
MR. WOBBROCK: Dr. Benowitz.
MR. PHILLIPS: By Dr. Benowitz?

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MR. WOBBROCK: Well, no, it was a hypothetical given to into Dr. Benowitz. We'll get to that.
MR. PHILLIPS: Well, he can give -- I object to the question, Your Honor. He can give the witness a hypothetical, but he can't read testimony of other witnesses that this witness hasn't heard.
MR. WOBBROCK: This is a hypothetical, Your Honor.
THE COURT: Go ahead.
BY MR. WOBBROCK:
Q So assume these facts. This is the hypothetical was given to Dr. Benowitz.
Her first effort to quit smoking in late 1970 -- excuse me. I'm sorry, Ms. Powers.
She made an attempt in the late 1960s after her husband quit. Her first concerted effort to quit smoking was in the late 1970 or early 1980.
So those are two attempts right there, right?
A Yeah.
Q One after the death of her father and one with her husband?
A Yes, that's two.
Q She tried to quit by tapering, but was unable to regulate her smoking.
So we're talking about those first two.
Several months later, Richard Schwarz, her

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husband, tried regulating Michelle Schwarz' smoking by dispensing cigarettes, but that didn't work, either.

So that's the third one, correct?

A Correct.

Q And that effort lasted about ten days. Her next attempt was in the mid '80s with the use of nicotine replacement gum. She was unsuccessful.

So that would be the fourth attempt, correct sir?

A Yes.

Q And this comports with what you know so far?

A Yes.

Q She next tried in the early '90s nicotine replacement patches at a time when they came out by prescription.

That comports with what you understand, correct?

A Yes.

Q She tried to quit using the patches two or three different times. She tried to quit by using the patches two or three different times, all were unsuccessful.

So that puts us up from four to either five, six or seven attempts, depending upon how many times she used the patches, correct, sir?

A Assuming that's true, yes.

Q All right.

And did you read the husband's testimony about how

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he said she did that?
A Yes.
Q Okay. But you didn't tell the jury that she tried the patches five or six -- three or four -- excuse me, two or three times, did you?
A No.
Q And then it says she also tried hypnosis in the late 1980s without success, and you were aware of that?
A Yes.
Q And that puts it up to eight times. And if she did hypnosis twice, that would be time nine times, would it not, sir?
A Yes, it would.
Q Yet with the help of the lawyers in this case, you folks concocted this summary that really only lists five times, doesn't it?
MR. PHILLIPS: Your Honor, I'm going to object to the argumentative nature of that question and ask it be stricken.
THE COURT: Would you rephrase the question, counsel.
MR. WOBBROCK: You want any to remove the word "concocted", Your Honor.
THE COURT: Yes, please.
MR. WOBBROCK: All right.

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Q With the help of the lawyers, you guys also prepared this, didn't you, sir?
A I asked that this -- this item be prepared to help explain these quit attempts, yes.
Q Okay. But at least from other testimony and other evidence, we've got nine attempts, and here you've got five, correct?
A Assuming what you said is true, that's correct.
Q Right. And here we have -- I just put this in in my own scribble, hypnotism times two, you were aware of that report?
A I was.
Q Okay.
In other words, sir, you've been hired by Philip Morris to come in here and tell this jury that her death from cancer caused by smoking is all her fault and Philip Morris bears no responsibility. That's the purpose you were brought into this courtroom, isn't it, sir?
A No. I disagree.
Q Well, the jury will make up its own mind about whether or not you gave Michelle Schwarz any benefit of the doubt about any of this, won't they, sir?
A I don't know that.
Q Well, you didn't give her any benefit of the doubt, did you?

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A No. I think that Michelle Schwarz was a bright, capable lady who managed her life in spite of her smoking. I think that it's very clear she was able to work, take care of a family, work in her husband's office, and, unfortunately, she chose to smoke.

Q And you don't think Philip Morris bears any responsibility, if this jury is asked to weigh the percentages of responsibility in this case, as to what has gone on in the -- in Philip Morris' business and how they started grooming people to smoke at a young age and how she started at age 18, and how she got addicted, and how they encouraged that and how they concealed information about their product and continued to deceive her with low-tar cigarettes. You don't believe that that contributes at all to her death, do you, sir?

MR. PHILLIPS: Objection, Your Honor. That's closing argument, argumentative and calls for legal conclusion. Inappropriate.

MR. WOBBROCK: Goes to the issue of bias and prejudice, Your Honor, and how he views the facts of this case.

THE COURT: I'll let him answer the question. Go ahead, counsel.

THE WITNESS: I don't have an opinion specifically about Philip Morris. I find tobacco products in

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general to be distasteful, I think they are dangerous, but I am not certainly not an expert in Philip Morris or other companies. I am relying on my 30 years of treating patients, and I'm dedicated to effectively treating people whether it be nicotine or other drugs and getting them off of them.

BY MR. WOBBROCK:

Q And, Doctor, would it be fair to say that your treatment of heroin, cocaine, benzodiazepines, other either prescription drugs or street drugs, has been a specialty of yours for the past number of years?

A Yes, it has.

Q And, in fact, nicotine or cigarette cessation is not, would it be fair to say, the center or the majority of your treatment?

A It's not the majority by any means, but we run an active clinic as I have described, and we treat folks with nicotine problems every single day.

Q And when you started CODA, or became involved in CODA with Dr. Blatchly, the main purpose of that program was to treat people that had hard street drug abuse problems, would you agree?

A That initial grant was to treat people addicted to opiates.

Q Right. Opiates.

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And, in fact, you became involved with the courts and the people that became involved in the criminal justice system because of their drug use, and you were often -- sent those people on Court mandated treatment programs to try and cure them of their addictions?

A I do.

Q And that has been really one of the main focuses of your practice throughout your practice, has it not, sir?

A Yes, it has.

Q And, in fact, where you are probably going this afternoon is related to a criminal justice matter --

A It is.

Q -- correct?

And oftentimes, you will have to go to Court and testify that this person that's a heroin user or a cocaine user is complying with certain probation restrictions or parole restrictions, or something like that, and that you're helping them quit their habit?

A That's correct.

Q And I think that finds you in Court as you testified -- I think we got another area of agreement -- I think that you find yourself in court a couple times a month, at least.

A Yes.

Q You would agree, Doctor, that you're a

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practitioner who doesn't publish?
A I do not.
Q That you do not peer review articles for other publications?
A Peer review? No, I don't.
Q Of course, you never saw Michelle Schwarz or talked to any of the members of her family.
A I did not.
Q Only read records and depositions and that sort of thing?
A That's correct.
Q Doctor, you mentioned that you're not Board Certified.
A I'm not.
Q Board certification requires that you do a period of practice for a couple of years, correct?
A You have to complete a recognized residency program, then you have to practice for a period of time, yes.
Q Right. And then you have to take a test?
A That's correct.
Q And about 60 percent of those that have done those other things, a period of practice, only about 60 percent of those pass the test on the first occasion, is that correct?
A I don't know that.

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Q In any event, you've never bothered to take that test?
A I have not.
Q But when you become Board Certified as about, what, 50 percent of the psychiatrists are, maybe 60 percent?
A Again, I don't know that figure.
Q Okay. Well, when you become Board Certified, what you're saying is you've done the utmost in your profession to guarantee or to signify, I should say, to your peers in the profession and the public that you've done the utmost to stay abreast of things, to stay up on the literature, to stay current with the current trends, and to prove to the rest of your professional peers and colleagues and the public that you are one cut above those that haven't become Board Certified; would you agree that's what that signifies?
A I would disagree with that.
Q Okay. Well, when you do that, you have gone the extra mile for the public and your peers, have you not?
A You've taken the test, yes.
Q All right. And when you become Board Certified, you then take that test and you have to become recertified at certain periods, don't you?
A Yes.
Q What is it; every five years, every ten years?
A I don't know.

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Q But when you become recertified, one of the things you have to do is indicate your familiarity with the literature and the current treatment trends and modalities, correct?
A Correct.
Q And so by doing that -- I think we have another area of agreement here -- you're really saying to the world: If I'm board certified, I'm up on things; correct?
A You could assume that, yes.
Q All right.
Now, when Michelle Schwarz started smoking at age 18 in 1964, do you think that she knew that she would have to go through an extensive detox or cessation program if she was ever to get off of cigarettes?
MR. PHILLIPS: Objection, Your Honor. This is well beyond the scope.
THE COURT: Overruled. I'll let him answer, if he can.
THE WITNESS: I have no way of knowing if she knew, but I knew.
BY MR. WOBBROCK:
Q Um, most people know heroin and cocaine are addictive, don't you agree?
A I would agree.
Q And most people know that there's no way if you

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use those drugs you can reduce the risk of using those drugs, would you agree?

A No, I wouldn't.

Q Do you think some people think that you can use heroin and cocaine less risky than other ways?

A Oh, absolutely.

Q In other words, injection versus snorting, or something like that?

A Or amount of frequency. People who use these drugs are quite knowledgable about how to use them.

Q I see. But you would agree, sir, that when people start using heroin or cocaine, they know that they are crossing a line into a really dangerous area?

A No, I believe that most people at that point operate on a position of denial, that: I can use this. It's not going to hurt me.

Q You think that applies to cigarettes, 18 year olds?

A Probably because --

Q 1964?

A If I could finish.

Q I'm sorry, sir. I didn't mean to interrupt you.

A Probably because teenagers are invincible, and they don't think in terms of what activity now may affect them 20, 30, 40 years from now.

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Q 1964, were you a senior or a junior at the University of Oregon?
A I was.
Q And did you watch television? I know you were trying to get ready to go to medical school, so you were probably working pretty hard studying. But did you ever watch television?
A Hardly ever.
Q Do you remember television in those days?
A Oh, yes.
Q Do you remember the TV ads for cigarettes?
A I'm sure I've seen them, but I don't recall specific ones.
Q "I would rather fight than switch", the Marlboro man.
A Marlboro man I remember.
Q The Benson & Hedges with the cigarettes too long and it would get bent, and we saw some of those ads. Do you remember any of that stuff?
A I don't recall that.
Q Would you agree, sir, that those kinds of ads in 1964 were, in part, capable of diminishing the consciousness of a prospective smoker as to the risk if they were 18 years old?
A Decreasing the consciousness?

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Q Of the risk of smoking of a prospective smoker.
A First of all, I'm certainly not an expert in advertising on the affect on people by any means. Advertising, obviously, has some affect on all the consumer products we use. But whether or not it affected people at that time, I have no way of knowing.
Q Well, back in those days when Michelle Schwarz started smoking, would you agree that doctors smoked?
A Oh, yes.
Q Nurses smoked?
A Yes, they did.
Q 1964, wasn't uncommon to see doctors and nurses smoking?
A It was not.
Q And when someone like that smokes, that also tends to reduce your perception of the risk of what you're about to engage in, doesn't it?
A I don't think it reduces the perception. I think it, as I said, is a social phenomena, and it makes it more attractive, yes.
Q But if you are a young person of age 18 and you see doctors around you smoking, isn't it likely you're going to say: Well, it can't be all that bad.
A I don't think that's true at all.
Q You don't? Okay.

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Do you agree, sir, that if the manufacturers of cigarettes in 1964 had come out and said to someone like Michelle Schwarz "These things are deadly. They're going to addict you, and they may kill you, and you've got a one in ten chance of dying of cancer if you smoke these", that that might affect what you called her "will" later on, her resolve in whether to smoke if she was told that when she started?

A When I -- what I do know about these warnings is that for a short period of time, it generally decreases the amount of -- number of people who smoke; and in a very short time, it tends to increase again. So what would have happened back then, I don't know. Again, young people do not believe that things are going to hurt them in the future.

Q Do you think the cigarette companies, particularly Philip Morris, capitalized on that knowledge?

A I have no way to know that.

Q Wouldn't that affect your evaluation of what her will was to quit?

A Oh, no. Not at all. I see people every single day using cigarettes. I'm not appreciably concerned in the type of cigarette brand or who has put it out. I am concerned with the amount used, the duration, so that I can institute an appropriate quit program.

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Q What is your understanding, sir, of the warnings that were on the package of cigarettes that she started to smoke in 1964?

MR. PHILLIPS: Your Honor, I'm sorry. This is so well beyond the scope. This witness is not here to testify about warnings, he's here to testify about addiction.

MR. WOBBROCK: Not at all, Your Honor. It all goes to the issue what he talked about, will and resolve.

THE COURT: Overruled.

Proceed, please.

BY MR. WOBBROCK:

Q What is your understanding of the warnings that were on a package of cigarettes in 1964?

A I don't know what the warnings were.

Q In fact, there weren't any, were there, sir?

A I don't know that.

Q In fact, when the warnings did come on in 1966, they said "cigarette smoking may be hazardous to your health", didn't they, sir?

A I've seen that warning, yes.

Q And if someone was aware of the "may be hazardous to your health", that might lessen their will or resolve to wanted to quit smoking because they, as a young person,

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would think: It's not going to affect me.
A I don't think the warning has really anything to do with it. I think that people are bright, knowledgable, and, again, they believe that it's not going to hurt them. It's called denial.
Q Do you agree, sir, that -- let's see if we can find an area of agreement, here -- would you agree that some people are more addicted to nicotine than others?
A Yes, I would.
Q Individual differences, just like some of us are taller and some of us are shorter and some of us are -- can run faster and some of us can read faster, and all of that. All those individual differences apply to nicotine addiction also?
A That's true.
Q Point of agreement. Good.
And, therefore, for some people, it's harder to quit, would you agree with that?
A I would.
Q Okay.
Would you agree that any given quit attempt -- I believe Dr. Benowitz testified, and I want to you assume that -- would you agree with him when he said any given quit attempt, when you look at it in an isolated framework, has about 10 percent chance of being successful?

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A Depending on the quit attempt, I'm assuming he said that.
Q But I'm asking you to assume that, sir. I want to know if you agree with it.
A I don't know about the percentage, but, generally, I would agree with that.
Q Would you agree, sir, that someone who is depressed may have a harder time quitting than someone who isn't?
A If it's untreated, yes.
Q And you noted in this case, looking at the records, that Michelle Schwarz from time to time was on antidepressants?
A Yes, she was.
Q And did you understand from the testimony of her husband that she became depressed during a period of time when he had become -- when he had been diagnosed with Parkinson's disease?
A Yes, I did.
Q Did you understand that he ended up in a wheelchair for part of that time?
A I don't recall that.
Q Did you understand that his disease has waxed and waned. It's gotten worse and its gotten better, it's gotten worse and it's gotten better, but that he had significant

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problems with his Parkinson's disease?
A I understand that he had significant problems and that likely lead to his retirement.
Q Did you understand that he had significant tremor, that his arms and limbs would shake and he had difficulty walking?
A Not specifically, but that's a typical course of Parkinson's disease.
Q That's the kind of thing that if you're in love with your spouse and you are concerned about them could lead to depression, could it not, sir?
A It could.
Q Let's see if we have another point of agreement, Dr. Larsen.
Would you agree that there's a difference between the will to quit and the free will to quit?
A I don't believe that there's an issue about free will to quit. But there is -- to put it a different way -- I don't -- I have never seen people who don't have free will to make choices.
Q Uh-huh.
A There is differences from person to person on the will to quit, though.
Q Do you think that your view about this might be different than other psychiatrists that treat addiction?

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A Oh, it may be different, but I have no way to know what other psychiatrists --

Q Right. Do you think other psychiatrists might think, for example, that the free will to quit might be limited because of the body's physiological addiction?

A It is more difficult to quit any drug if you're addicted. I have never -- and I lecture on this, I teach on this -- I have never heard anybody say that they don't have free will.

Q Dr. Benowitz was in this courtroom and testified that the biopsy of brains of people that have been nicotine users over the years, when their brains are looked at under a microscope, there's actual brain changes from the nicotine that has led to their addiction. Are you -- do you agree with that, sir?

A There are brain changes, not only with nicotine, with Valium, with cocaine, with opiates, there are brain changes in the fat. So, yeah, every substance we put in causes some kind of a change in the functioning of the brain. So I wouldn't disagree with that, no.

Q And he testified --

A But --

Q I'm sorry.

A -- if we're then jumping from that point to "they're addicted", that's a whole different matter.

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Q Would you defer to his opinion about those subjects being -- him being a pharmacologist and an author who has written over 300 different articles on nicotine of smoking and its addiction qualities -- would you defer to him, sir?

A On what basis?

Q On his expertise in this subject.

A Well, if he's expressing expertise on his research, I wouldn't disagree with that. But if he's going to enter that area of treatment, then, yes, I would argue with him at any time.

Q If he were in this courtroom -- I want you to assume that he was in this courtroom and he said it has nothing to do with someone's -- if they're really addicted, it has nothing to do with their amount of resolve or will or moral strength whether they can get off of cigarettes. To some people, they're so addicted that the brain changes, the physiological changes, that's what controls. Would you disagree with that?

A I would totally disagree with that because if it were true, all of the people that I treat -- and 150 employees who work in our program would be out of work. We treat people who are addicted every single day. And in my clinical experience, we have to get to a point where that individual decides to quit. When they decide, they can

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benefit from such a program.
Q In that regard, Mr. Phillips asked you to assume that someone testified in this courtroom -- I think he was referring to Dr. Benowitz -- that addiction to nicotine is the same as addiction to heroin. Now, I want you to assume that Dr. Benowitz never said that. He never once said that.
A Okay.
Q What he did say is that some people, it's as difficult or more difficult to stop cigarettes than heroin. That's, in fact, what he said. I want you to assume that.
A Right.
Q Would you agree with that?
A I would disagree.
Q I'm going to ask you if you agree with this, sir.
This is Exhibit 206.
This is a letter -- and I don't know if you've seen this, so if you haven't, I'll tell you a little bit about it and ask you to assume certain things.
This is Exhibit 206, and it's a letter. Just take a moment to look at it. You don't need to read the whole thing because it's the next page that we're concerned with. But as soon as you can tell me whether you've seen it or not is the first question.
A I have not seen this.
Q Okay.

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I want you to assume that this is a letter on behalf of an organization that represented Philip Morris' interests. It's called the Tobacco Institute. It's no longer in existence, but it was at this time. And these fellows up here were involved with the Tobacco Institute. So you see reference in here to the "Institute". And this is September 9th, 1980.

And it talks about reference in the National Institute of Drug Abuse wants to put "addictive" in the reference to the cigarette warning. Do you see that, sir?

A Yes.

Q Okay. And then the Tobacco Institute, which is a public relations arm of the tobacco industry representing Philip Morris and all the other manufacturers, were concerned about this. And the jury has heard all about this.

A Okay.

Q The next page, this fellow is expressing his concerns about that, and he says: I feel badly about my own lack of intelligence gathering in this situation. But I don't think the question I now raise -- the questions I now raise -- are academic.

Shook Hardy -- do you know who they are, by chance?

A No, I don't.

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Q That's a law firm that represented Philip Morris and still does for years.
A Okay.
Q Reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer cigarette case.
Do you understand who the prosecuting attorney is in this room right now?
A Prosecuting attorney?
Q Yeah.
A No.
Q Do you understand who that is?
A No.
Q That's me.
A You're a prosecutor? I thought this was a civil case.
Q It is. But in this context, "prosecuting" mean plaintiff's attorney.
A Oh, okay.
Q The one who is prosecuting the case.
A Fine.
Q Okay? All right.
I'm told that -- excuse me.
Shook Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon that a

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prosecuting attorney can have in a lung cancer cigarette case. We can't defend continued smoking as free choice if the person was addicted.

Now, do you understand, sir, that you're brought here to refute that assertion by the law firm that has represented Philip Morris for 50 years?

A In my clinical experience, this issue of free choice is a moot question. Again, I'll have to emphasize that I see people every single day that are addicted. When they decide they want treatment, we treat them and it's effective.

Q Let's see if we can find another area of agreement here.

I want to you make an assumption here, Doctor. Assume that heroin and cocaine are legal products. Just assume that they're a legal product.

A Okay.

Q And assume that in addition to being legal, they're sold with a 8 billion dollar a year promotion budget, a national campaign that is designed to entice young people to want to smoke when they're of age, that it's a cool -- excuse me -- to use the drugs when they're of age, that it's a cool thing to do, that it has a certain image and surrounding it of, believe it or not, healthfulness in activity, athletic events, that sort of thing.

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If someone were to engage in the use of those drugs with that sort of an 8 billion dollar campaign, whatever you can imagine that might put with it in the way of promotions like cigarettes, every time you turn around you see the Marlboro tent, the little sign, and in this case, you would see the "get high heroin" ad or cocaine ad or whatever, don't you think, Doctor, that that would affect someone's perception and their will to want to quit if they thought that it was so accepted and so familiar and so widespread?

A If the drug as you've described it were available readily, it would very likely lead to more use. That in turn might lead to addiction, which in turn makes it harder to stop.

Q Doctor, you indicated in your testimony that you needed to see -- or you didn't see any evidence -- let me just see here. And given the amount she smoked for the duration, absent any significant impairment in her social life -- that was your mention -- your comment -- were you aware that occasionally she would have to get up and leave a theater, for example, in the middle of a movie?

A Yes.

Q Would you see that as an impairment of a social life?

A No, that's very typical of people who smoke.

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After they go a period of time, they have a desire to smoke and they will go out, they will do things in order to smoke. It's very typical.

Q Were you aware that she would have to get up and sometimes leave even in the middle of a meal to have a cigarette?

A Again, that's commonly seen in people who smoke.

Q And would you -- were you aware that on a plane trip when her husband, who served as a medical officer, a surgeon, in the Army in Vietnam, he took her back there some 20 years, 15 years after the war and wanted to share those experiences with her. And he -- they're on a long plane flight with a lot of other veterans, and it was the first day that that airline had decided that they weren't going to let people smoke, and it was a 22 hour flight. And she actually started pacing, getting agitated to the extent that the flight attendant allowed her to go in the bathroom and disable the smoke alarm so she could smoke.

Were you aware of that?

A Yes, I was.

Q That would be an impairment of social activities, would it not?

A People who are prepared, as you said, they -- perhaps the day before, they stopped the smoking on airplanes. If you're not prepared and you're a smoker and

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you have to go 20 some hours without smoking, it's not unusual that a person would have all of those kinds of symptoms.

Q That shows significant addiction, would it not, sir?

A It certainly says she's dependant on cigarettes, yes.

Q So let me see if I understand if we have another point of agreement here, sir.

If this jury had experience in their own personal lives with themselves or with someone who wanted to quit but could not, you would tell them that regardless of their desire to quit, either themselves or the person close to them, they couldn't quit -- if they couldn't quit, it was because they didn't want to bad enough; is that what you would tell them?

A No, I don't.

Q It's because they didn't have the will?

A No. A person has to make the personal choice, demonstrate the willingness and the ability to follow through. And if a person says I want to quit and can't, my next question is: What have you tried? And there are lots of programs, which we've talked about, that will help people quit.

Now, if they need to -- if they have made that

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decision and they want help, since they can't quit cold turkey, then they should be involved in these programs.

Q Well, the wanting to quit, would you agree, is one thing, and being able to quit is another. Two separate things.

A They're separate. Wanting to quit is one thing. But making the decision to quit is the critical issue here.

Q And I think we have a point of agreement. You would agree the ability to succeed in this effort would be affected by the individualistic level of physical addiction?

A If you have a greater addiction, meaning using more and more cigarettes, it does make it harder, yes.

Q From the records, she tried to quit sometime either July of '97 or September '97, two different reports about the same attempt. We have agreement on that?

A Yes.

Q You're aware that she was diagnosed with a brain tumor on February 10th or 11th of '98 --

A Yes.

Q -- correct, sir?

A Correct.

Q I know you're not a cancer specialist, but I know you're a medical doctor. The cancer, the primary tumor -- and it's not disputed in this case -- was in her lung, and then it metastasized or spread to her brain. That takes

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some time, does it not, sir?
A Yes, it does.
Q So her quit attempt in either July or September of '97, even if she had been successful, she probably already had cancer at that point.
A Ah, I don't know that. But I assume that that may be true.
Q And if her odds go up to being successful in quit attempts, if she had attempted to quit again, say, in February or March, or hadn't been diagnosed with cancer and its stresses that caused her to start smoking again, or even had gone another six months without cancer and tried to quit again, her chances of success eventually with repeated attempts would go up, would they not?
A With repeated attempts, yes, it does go up.
Q Okay. So we have a point of agreement.
The problem in this case was, she didn't have a chance to try again because she got cancer and died, isn't that true, sir?
A That's true.
Q She ran out of time, basically?
A Yes.
Q Do you find it easier for people or more -- whatever you want to call it -- will or resolve in the later stages of their life, in the '50s and '60s, to quit smoking

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than if, say, they're 30?
A Yes. The success rate in stopping goes up with age.
Q Now, the patches of gum, Doctor, you're aware that the mechanism that they get to the brain is quite different than the mechanism that nicotine -- excuse me -- let me start over.
With patches and gum, the way nicotine gets to the brain is quite different, the mechanism, than it gets to the brain when you actually inhale smoke with smoke in it from cigarettes, correct, sir?
A No, it's exactly the same.
Q Well, Dr. Benowitz testified in this courtroom -- and let's see if we disagree on this -- that when you inhale, the smoke goes into your lungs and then goes through the left side of the heart through the lungs and then goes to the brain in about seven seconds. Would you agree with that?
A The question was: Is the mechanism different? No. The nicotine is transported straight to the brain by the blood system, regardless of the root.
Q Right.
A If you inhale it, it gets there quicker.
Q That's what I meant to say, sir. I don't think we have a disagreement.

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The point is that the patches and the gum -- and this is for the jury to remember. There's been a lot of facts in this case, so I'm going to do my best here. But I think he said between 35 and 45 minutes with the gum and the patch as opposed to seven seconds when you inhale it from a cigarette. Would you agree with that?

A I can only agree that it's quicker.

Q Okay.

A Yes.

Q We don't know the number of minutes.

A I don't know.

Q I think we can agree, you and I, that we know that it's quicker, but we don't know how much quicker.

A Right.

Q Okay. All right.

Now, are you aware of that part of the addiction experience described as "impact"?

A No.

Q Well, I want you to assume that there's been evidence in the Philip Morris records and been testimony from numerous experts in this case that there is a phenomena known as "impact" in the back of the throat that, according to Dr. Benowitz, may go through the nerves or affect the nerves that go to the brain from other witnesses on the defense side. They said they didn't know if it did that or

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not. But that this impact experience as described in these records and by the doctors is part of the addiction experience, okay? And that Philip Morris has actually added bases -- in other words, substances -- with a higher pH because that increases the amount of impact.

Now, first question, sir, do you know anything about that?

A No, I don't.

Q Okay.

Would you agree, sir, that this impact phenomena, this hit in the back of the throat and maybe transference to the brain of sensation, is not something you get with a skin patch or gum?

A If that's true, I would agree. However, you said it impacts addiction, which is totally false. That is not true. Addiction, is, again, that phenomena of continued use over time where you gain tolerance. So it's simply not factual.

Q Well, you're aware of the concept of reinforcement?

A Yes.

Q And all the -- and you're probably going to quickly tell that I'm in your field, so if I don't ask this quite right --

A I'll try and help.

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Q You'll try and help me. I'm sure you will.
All of the constellation of things that surround the smoking experience, such as after a meal, first thing in the morning, all those things you would agree are part of the addiction experience?
A That's part of the psychological component of addiction, yes.
Q Okay. And what I'm trying to say, sir, is this impact in the back of the throat, just assume that to be a true fact.
A Okay.
Q If that is part of what someone senses when they smoke, that also could be part of the addiction experience, could it not?
A It could be part of the pleasurable experience that leads to addiction, yes.
Q Okay. All right.
Now, I take it from your testimony, Doctor, that you believe that the use of patches and gum that have nicotine in them is an important adjunct to the cessation or quitting of smoking?
A In some individuals, they're very helpful.
Q I want to ask you about some documents to see if -- well, before we do that, let me ask you this.
Do you believe that Philip Morris is supportive of

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efforts of people who want to quit?
A I don't know.
Q Do you believe that Philip Morris -- have you ever looked at their website?
A No.
Q Do you believe that Philip Morris would have people use these adjuncts, or at least say that they want them to use patches and gum if they want to quit?
A I don't know that.
Q Do you think it would be reasonable if they are to encourage people to quit that they should encourage the use of those products?
A Well, if they really want them to quit, yes, I would assume so.
Q And would you think it would be unreasonable to oppose the use of those products by Philip Morris if they say they want people to quit if they wanted to?
A I think that would be unreasonable.
Q Let me ask if you're aware of some documents here, Doctor.
This is a Philip Morris interoffice correspondence of July 21st, 1982, and the subject is the Merrell Dow pharmaceutical meeting, July 13, 1982, Exhibit 385.
And in attendance, you see Dow people and then these Philip Morris people, and then the reference here to

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Joe Bujold. Are you with me?
A Yes.
Q I'm just going to read this to you and ask you if you're aware of it, and then your view about it.
Joe Bujold requested this meeting so that Merrell Dow could present their issue on smoking and health issues. The following page points were covered: One, Dow chemical.
And Merrell Dow are not antismoking. They are not intentionally engaged in assault to the cigarette industry. Merrell's Nicorette chewing gum is a prescription drug -- this is number two.
Merrell's Nicorette chewing gum is a prescription drug sold through doctors to those patients who must quit smoking for health reasons. It is not a product aimed at the general public -- general smoking public -- as evidenced by its lousy taste and reportedly high cost.
Was there a point in time when the gum had a lousy taste?
A People reported that it tasted poorly -- has a bad taste. I've never chewed it. I don't know.
Q That's what I meant. People report that.
A Yeah.
Q Ken Monroe -- that's the Dow guy -- was unhappy with the inflammatory anticigarette tone of the first edition of the smoking cessation newsletter. Apparently,

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the newsletter was released before Monroe had taken over his new job. The second edition, copy attached is on hold, and -- excuse me -- Monroe is contemplating modification of this edition as well as termination of this publication. We encouraged him to cease further publication.

So do you understand this that Merrell Dow -- excuse me -- Philip Morris is encouraging Merrell Dow to cease further publication of the smoking cessation newsletter.

Do you understand that, Doctor --

A I hadn't seen this, yet, but, yes, I assume so.

Q -- from what I read?

We emphasize our dissatisfaction was not with Dow's manufacturing and distribution and distributing a pharmaceutical intended to help smokers who must quit for medical reasons; rather, we are displeased with Dow's circulation of antismoking propaganda, particularly literature which has little or no scientific basis.

Number five: Dow reported the press was investigating the story that the Tobacco Industry was pressuring Dow to drop Nicorette.

This is Exhibit 38 five to the jury.

Were you aware of this issue going on back in 1982?

A No, I was not.

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Q Let's look and see what else we can determine was happening.

This is October of '85. Philip Morris USA, Exhibit 406.

In attendance, this fellow. We've seen him testify before Congress. He was the president of Philip Morris. Bill Campbell. And there's Dow people here. Said: The meeting was held to afford Dow's top management the opportunity to explain Dow's position on Nicorette.

Nicorette is the nicotine gum, is it not, sir?

A Yes.

Q Dow reiterated they were not taking any antismoking position, and they were sensitive to the issue and our interests.

Butler, a member of Dow's Board of Directors, made it quite clear that Dow had not made a corporate decision that Nicorette was more important than the humectant business.

I want you to assume that we've heard that humectant is a substance that's put on tobacco, particularly something called reconstituted tobacco, to make it more pliable, okay?

A More --

Q So it doesn't break and crumble.

A Okay.

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Q To the contrary, he stated that PM is a very important account to Dow and Dow wants to reestablish there their position with Philip Morris.

So you understand that Philip Morris and Dow have a business relationship for the purpose of this drug -- or, excuse me -- or of this substance called humectant that is put on tobacco?

A Right.

Q Dow assured PM that the antismoking activities within their company and related to Nicorette were not part of any conscious program emanating from Dow's midland headquarters. The Freeport plant campaign to have employees stop smoking, for example, was instituted by a local company doctor. Butler -- that's the Dow person -- was unaware of the program until we complained.

So you're seeing here that Philip Morris is complaining to Dow that inside one of Dow's factories, there is an antismoking campaign. Are you aware of that?

A I was not aware.

Q Okay.

The setting up of Nicorette smoking cessation clinics and doctor's generous distribution of Nicorette pamphlets are not part of Dow's marketing program, but are attributed to the zealousness of some members of the medical profession.

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Sharrock -- another Dow fellow -- Sharrock said he had been carefully screening advertising and promotional materials to eliminate any inflammatory anti-industry statements. He intends the sales to be maintained on a basis of Nicorette being a product for those who want or need to stop smoking. Examples were cited where an ad agencies were put -- where ad agencies pushed antismoking themes and Sharrock vetoed the ideas.

So, you see, Mr. Sharrock is saying he is supportive of Philip Morris and vetoing ad agencies themes of antismoking.

Do you see that sir?

A Yes, I do.

Q It appeared as though Dow -- as though the Dow contingent gained additional insights into the sensitivities of the Nicorette issue as such areas of the twisting and application of Dow's program --

A Can we move up?

Q I'm sorry.

It appears as though the Dow contingent gained additional insights into the sensitivities of the Nicorette issue in such areas as the twisting and amplification of Dow's programs by overly zealous antismoking forces.

Dow is committed to avoid contributing to the anticigarette effort, despite the inherently negative

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connotations of Nicorette gum.

And then I'm skip down here.

It was reiterated that Dow has been a superior supplier and that we desire to maintain our relationship. However, further purchases would be predicated on Dow's performance as a supplier as well as the course of the Nicorette program.

As a measure of good faith, we will commence buying propylene glycol, but at significantly reduced levels relative to the pre-May suspension take.

Now, sir, do you understand from this -- particularly this paragraph: Future purchases would be predicated on Dow's performance as a supplier as well as the course of the Nicorette program. So Dow is selling Nicorette and Philip Morris is telling them: We're not going to be doing business with you unless you back off on your Nicorette program.

Do you understand that, sir?

A Yes, I do.

Q I'm going to skip ahead to Exhibit 412.

This story goes on for about six exhibits, and this is the last one. I'm just going to skip ahead in the interest of time.

This is December 16th, 1985, subject: Dow Nicorette. It's copied to the president of the company.

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Last week we received our last shipment of product from Dow Chemical. We pointed out to Dow that the joint American Lung Association Smoke Out Ad and the emotional radio pleas to stop smoking clearly violated our understanding that Nicorette would be marketed strictly on the basis of, quote, if you want or need to quit, we have the product. In addition, all support of purely antismoking groups and emotional/propaganda types of advertising were to cease.

So you understand that they were upset because Dow was promoting the smokeout of the American Lung Association and that they were contending that Dow -- purely antismoking groups and emotional/propaganda types of advertising were to cease. That's what they were arguing to Dow. You understand that?

A I do.

Q Abandoning Dow was not without some risk.

So they're not going to do business with Dow anymore; do you understand that?

A Yes.

Q They are the only US synthetic glycerine supplier, which means that they can increase output by simply raising operating rates. Further, Dow is one of only two producers of propylene oxide, which is the basic material for propylene glycol.

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We have adequately sourced our 1986 requirements by securing increased volume from our present suppliers, and qualifying two additional suppliers.

So because of their position with Nicorette gum and the position of antismoking, Philip Morris tried to pressure them, was unsuccessful, and quit doing business.

Does that comport with what you have just seen?

A I would agree.

Q Now, sir, as a person who has dedicated their professional life to try and get people to stop smoking, and uses as part of that -- at least part of your professional life to stop smoking, part of it is heroin and opium and all of that, but addictions in general, correct, sir?

A Correct.

Q And as part of your therapy in that regard, you want people to have access to Nicorette gum, patches, those things that Dow made. Do you think that that is a responsible behavior on the part of Philip Morris to pressure the manufacturer of that product, to tone down its promotion so people like you will have less access to it for their patients?

A No, I think that's inappropriate.

Q It would be bad behavior, would it not?

A Inappropriate, yes.

Q Okay.

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Heading down the home stretch, here, Doctor.
Let's see if we have some areas of agreement, again, sir.
This is the chart that you put up about -- let's see if we can get that a little better -- her smoking history, correct?
A Correct.
Q And if you look at the records -- here is a chart that I made.
As you may remember, and some of the jurors do, a fellow by the name of Paul Harvey said: This is the rest of the story. Is it not, sir? This is the rest of the history in her medical records about her smoking that you did not put on this chart. For example, this chart stops December 10th, correct?
A Correct.
Q And this chart starts September 24th of '97. This is December 10th of '96 -- oops.
And this chart is September 24th of '97. And it goes up until July 8th of '99. And I don't know if you know, but in the -- you probably do because in the records, it shows that she passed away on July 13th of '99.
A Thirteenth.
Q And what this shows, as opposed to the chart that you or the lawyers prepared, is a little more detail that

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was not given to the jury about her smoking history. Some of it we've already discussed.

But a half a fact to a pack times 30 years, one. Pack per day most of the life. The evidence you gave them said half a pack to three quarter pack. Stopped in 7/97, restarted in 12/97. We already talked about Dr. Williamson's history. Stopped in 7/97, occasional usage since that time.

Down here. One pack times 30 years. One pack times 30 years. One pack a day. One pack per day the last 30 years or so.

That's really the rest of the story, is it not, sir.

A Yes.

Q You also said that -- I believe, here -- we -- see if we have an area of agreement, again.

You put much importance on this note of February 13th, '98: Denying any nicotine withdrawal symptoms.

And you put a lot of importance on that, didn't you?

A I felt that was important, yes.

Q Right. She had, in fact, had been diagnosed either 48 hours previous or maybe even 24 hours previous and told that she had a brain tumor, correct?

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A Yes.
Q And had been scheduled, if not -- I think that day -- the 13th -- this day, to have her head cut open and that orange-size tumor -- I'm not sure it's orange size -- maybe walnut tumor removed this day, correct?
A That was the reason she was hospitalized, yes.
Q And, in fact, you would consider that, if you had been told -- if a patient had been told 48 hours, 24 hours, before: You've got a brain tumor in your lung and you got one in your head, and we're going to cut open your head and we're going to carve it out of there, or words that doctors more appropriately use, we're going to surgically remove that tumor; you would expect under those circumstances that she might be very distracted?
A Distracted?
Q Distracted.
A Concerned, distracted, absolutely.
Q Okay. And maybe, just maybe, not so concerned about smoking at this point?
A Well, that may be. But, again, we talked about the issues of how stress are related. If she stopped smoking, regardless of the stress, if she has symptoms, they would be seen and she would report them more than likely.
Q "In good spirits". In fact, right there, that entry, could refer to the fact that she's looking at this

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maybe with a positive framework, even though it's pretty bad news?

A Hopefully, yes.

Q Doctor, would you agree that it's just pretty much understood amongst people like yourselves in your profession that when someone gets cancer, it's more related -- well, the relationship between smoking and cancer is somewhat dose related; the more tar and nicotine -- or, excuse me, the more tar you get in your lungs, the greater chance you have to get cancer?

A In theory, that's true.

Q And would you agree that if someone wanted -- at least had the perception of wanting to lessen their chance of getting cancer, if they smoked a cigarette that supposedly had less tar, they might perceive that they had less exposure to cancer?

A Well, I think that the perception is that with filters or less tar, yes, it is more healthy, yeah.

Q So if someone were to think "if I'm going to smoke, I can lessen my risk by smoking these low-tar cigarettes," that would be a common perception, you think, amongst smokers?

A I believe so.

Q And if Michelle Schwarz's husband, who was a medical doctor, when she brought home the first carton of

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Merits, thought that, too, and, in fact, also thought: And it my help her wean herself off because she's getting half the amount of nicotine, back in 1976, that might be a reasonable conclusion for him to make, too, would it not?

A If he made that, yeah, it would be reasonable.

Q All right.

Do you know, however, Doctor, the concept of compensation when someone smokes?

A Not in those terms, no.

Q Let me see if I can explain it to you with the help of a previous exhibit.

Referring to 2036.

This is 16 milligrams of tar, 1 milligram of nicotine. It's also known as Benson & Hedges. It's also known as Marlboro. Same cigarette, different label --

A Okay.

Q -- according to the experts from the company.

Merit has half the amount of nicotine and tar, 8 milligrams of tar, and a half milligram of nicotine. The concept of compensation is that when someone smokes these Merit cigarettes, they try to get the same amount of tar and nicotine, so they smoke them harder and they actually get the 16-milligram and the 1 milligram of nicotine. Okay?

A Yeah.

Q So they get the same exposure. Compensation works

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the other way. It doesn't have much to do with this case. But if you smoked a higher tar cigarette, and you were to switch to Benson & Hedges, you would back off because you wouldn't -- excuse me. If you went from Benson & Hedges to a higher tar cigarette instead of a lower tar cigarette, went up, you would back off because you wouldn't need as much tar and nicotine.

A Okay.

Q All right.

Now, if someone were to, such as Michelle Schwarz, to switch down from the 16 milligram to the eight cigarette and think, as her husband, who was a medical doctor, did, and think that they were doing themselves some good, do you think it would be -- that would have an affect upon their will or resolve to want to quit?

A No.

Q So if they thought that, you know, this is not as serious a problem as it used to be because I'm getting half as much, I look at the advertisements and it shows half as much and I'm getting half as much, therefore, I can feel somewhat less exposed to the risk. That certainly could have an affect upon the resolve or desire to quit, could it not, Doctor?

A I don't believe that. And, again, my experience, people smoke cigarettes. Frankly, I don't think we've ever

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looked at what particular type of cigarette because treatment has to be dedicated and adjusted to the particular individual. The question, as I understood it, had to do with the resolve to quit.

Q The resolve, the will. I think you've used to term "will".

A Right.

Q Does "resolve" and "will" mean the same thing to you?

A They could.

Q Okay. So -- I'm sorry, sir, I --

A But I think a person, regardless of whether this is in play or not, has to come to that personal choice and make that personal decision to quit.

Q But don't you think, sir, that if they believed that they're not exposing themselves to such risk, that that resolve or will to quit may lessen?

A No, I think it's just the opposite. I think if a person falsely believes it decreased their risk, it gives them more resolve, so to speak, to continue smoking because it's not going to hurt them.

Q Well, you and I disagree on that --

A Okay.

Q -- and that's why we have juries.

Let me ask you if you're aware of this concept,

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then, sir.

This is from NCI 13 monograph: Risks associated with smoking cigarettes.

MR. PHILLIPS: Your Honor -- excuse me, Mr. Wobbrock.

I would like to preserve my objection with respect to what counsel is doing.

THE COURT: All right.

Go ahead.

BY MR. WOBBROCK:

Q With low machine yield of tar and nicotine.

Have you ever heard of Dr. Neal Benowitz?

A Yes.

Q This is his chapter, chapter three.

In summary, cigarette smoking can be viewed as a process of delivering nicotine to the body. Daily smoking can be viewed as a situation in which nicotine is taken initially for pleasure, for arousal and/or mood modulation. As the day progresses for the smoker, tolerance develops to many of the effects of nicotine, and further nicotine may be taken to primarily relieve withdrawal symptoms that emerge between cigarettes.

Do you agree with that so far?

A I agree.

Q Smokers appear to have particular desirable levels

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of nicotine intake throughout the day that result in optional -- optimal functioning.

Do you agree with that?

A Yes.

Q The need for a particular level of nicotine is central to the concept of compensation for low-yield cigarettes, that concept we were just talking about.

Do you agree with that, sir?

A I would agree.

Q Okay. All right.

And I'll ask you if you're aware of this: Spontaneous brand switching. What that means is, as we've learned in the last six weeks, when you go from a Benson & Hedges or a Marlboro to another cigarette because you wanted to -- somebody doesn't make you as an experiment, they don't put you in a room and say "smoke this," okay, you do it on your own -- spontaneous brand switching studies suggest that there is no reduction in smoke intake per cigarette and that any reductions that were seen in brand switchers depended upon whether or not those individuals also cut down their cigarette consumption.

Do you agree with that, sir?

A Yes.

MR. WOBBROCK: Okay.

Do you have 2020, Exhibit 2020?

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MR. TAUMAN: Here.
BY MR. WOBBROCK:
Q This is Exhibit 2020, Doctor, and I'm going to ask if you're familiar with this article by Dr. Benowitz.
A No, I'm not.
Q Okay.
Let me ask you if you agree with one of the things he says, however, just based upon your experience and your training.
I'm going to read you two passages, sir. Tobacco -- and I can put it up here so you can follow along. That might be easier. This is under "Discussion".
Tobacco from low-yield cigarettes does not contain less nicotine than tobacco from higher yield cigarettes.
Do you have any familiarity with that?
A No, I do not.
Q This is probably well-known to the tobacco industry, but to your knowledge, it has not been discussed in the medical literature. The main determinants of whether a cigarette has a low or high yield in machine testing are the characteristics of its ventilation and burning.
Now, "machine testing" refers to the FTC machine. You're familiar with that?
A I am.
Q And the "ventilation" refers to the holes around

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the filter.
A Right.
Q And the "burning" refers to a treatment to the paper that causes it to burn faster or slower.
A I didn't know that.
Q Okay.
Both these variables are under the control of the cigarette smoker and allow considerable variation in nicotine intake.
Are you aware of that, sir?
A I was not.
Q We also found that people who wanted to stop smoking and who were smoking low-yield cigarettes did not consume less nicotine, as judged by blood cotinine concentrations, than smokers of higher yield cigarettes.
In other words -- are you aware of that, sir?
A No, I wasn't.
Q Okay. That would be something that you as someone who treated people who want to quit smoking would want to know?
A No, it wouldn't. It would really have no bearing.
Q All right.
Let's look at this last part here, and I'm going to have you out of here in about ten minutes, Doctor. Are we doing okay time-wise?

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A Yeah, we're fine.
Q Okay.
We think that in the case of the habitual smoker, for whom cutting down on nicotine and tar intake is considered to be medically important, it is unlikely that changing the brand of cigarettes will accomplish this goal.
Were you familiar with that?
A No.
Q Under summary, we found what the tobacco and low-yield cigarette does not, quote, contain, unquote, less nicotine than higher yield cigarettes, and that smokers of these cigarettes do not consume less nicotine.
Familiar with that concept, sir?
A No.
Q The FTC cigarette testing data do not predict nicotine intake by the cigarette smoker.
Were you aware of that?
A No.
Q Advertisements from cigarette manufacturers suggesting that smokers of low-yield cigarettes will be exposed to less tar and nicotine are misleading.
Do you agree with that, sir?
A Well, I've seen this issue about nicotine introduction, but this is the first thing I've see about tar. So I don't know.

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Q Patients who smoke cigarettes should be so advised.

If that is the truth, assuming this to be the truth, would you agree that patients should be so advised?

A I think it would be fine to advise them. Nobody is going to understand it, but, yes, it's a good idea.

Q Well, if the bottom line is you're not going to get less tar and nicotine out of a low-tar cigarette, if you're addicted, because you're probably going to compensate even though you don't know it, do you think the patient ought to be advised?

A Well, if the delivery makes no difference, then the compensation doesn't occur.

Q That's an area that's kind of beyond your expertise, isn't it, sir?

A Well, you presented this, and it looks like contradiction. Yes, it's beyond my experience.

Q Well, in fact, it's totally consistent with what I told you, I believe, when it says -- and let's see if you agree with me.

In summary, we found that the tobacco in low-yield cigarettes does not contain less nicotine than higher yield cigarettes -- excuse me. Oops. Okay.

And that smokers of these cigarettes do not contain -- consume less nicotine. Okay.

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A Yes.
Q In other words, if you smoke a high tar -- excuse me -- a Benson & Hedges and a Merit, you're going to get the same amount of nicotine, right?
A Assuming that's true, yes.
Q The FTC cigarette testing data do not predict nicotine intake by the cigarette smoker. Advertisements for cigarette manufacturers suggesting that smokers of low-yield cigarettes would be exposed to less tar and nicotine are misleading.
Now, if compensation occurs, as we discussed on that chart, this would be a true statement, would it not, sir?
A Well, again, assuming -- again, this is outside of my area of expertise, I would agree.
Q All right.
Doctor, I want to ask you how much you actually know about Michelle Schwarz and what kind of a person she is.
Do you know that she would work at her husband's medical office in a clerical capacity; do you know that?
A I knew she worked at the office, yes.
Q And after she had taken care of one or both of her sons in the morning and taken them to band practice or sports, she would then work all day, and even on her way

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home stop by and check on her mother.
Do you ever see any evidence of that?
A I knew she took care of her children, and I wasn't aware she stopped to see her mother.
Q Are you aware she is an only child?
A Yes.
Q And that she then visited with her mother sometimes just ten minutes, you know, 15 minutes, and then come home and she'd fix dinner. And then she would help everyone prepare for the next day, including her husband, and then get ready to take the kids to school and go back to work and do it all over again.
That shows a lady that has some will or resolve, correct?
A Yes.
Q You know that her father, she was told, had emphysema and had asked her to quit smoking. Are you aware of that?
A Yes.
Q And are you aware that both of her sons had asked her to quit smoking?
A Yes.
Q And are you aware that her husband had asked her numerous times to quit smoking?
A He had.

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Q And are you aware that her mother testified that Michelle paid for hypnosis treatment with her mother and went to hypnosis with her mother to try and quit smoking?
A Yes. And I am aware she went to hypnosis.
Q And you're aware that when her husband asked her -- I think we had already talked about this -- to quit smoking, he rationed her cigarettes, he tried to get them on a -- to decrease them on a regular basis, and that didn't seem to work.
A Correct.
Q Are you aware of that?
So that shows that it's a woman who had a lot of incentives from her sons, her mother, her father -- or -- her father, and her husband to want to quit smoking; correct?
A Correct.
Q Are you also aware that on the -- in the last five weeks of her life, she left the hospital -- this is a discharge summary of June 23 of '99.
She left the hospital because the patient, meaning Michelle Schwarz, was desirous to attend her son's wedding in Boston and her condition was stabilized.
Are you aware of that?
A Yes.
Q And the discharge plan, the nurse noted: "My son

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is getting married a week from Saturday, and I will be there", exclamation point.

Are you aware of that?

A Yes.

Q And are you aware, sir, that when she went to the wedding, at the time of the ceremony, even though she was in a wheelchair and on oxygen, she got up out of that chair, took off the oxygen and walked down the aisle in the wedding procession.

A Yes, I was.

Q And after the ceremony, they went to lunch. And despite all she had been through, she asked for a cigarette.

That shows a strong addiction, does it not, sir?

A No, it's not an all -- at all unusual for a person in the declining weeks or days of their life to finally decide: Makes no difference, I enjoy it, so I'll smoke.

Q Fighting her way out of that hospital and carrying oxygen on the airplane and transported in a wheelchair, and changing planes in Chicago and going down through the concourse and getting on another plane, and then flying to Boston and then getting up out of that wheelchair and taking off that oxygen and walking down the aisle, and sitting there and then putting that oxygen back on right after she did that because she was having a hard time breathing, and then dying three weeks later, shows a substantial amount of

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will --
A Yes, I believe that.
Q -- of this lady?
A I believe that this is a strong lady, and it's not, again, unusual for people to set a date or an event that they're going to continue until that time. So it's comparable.
Q You would agree a lady with strong resolve and strong will, correct, sir?
A Would I agree that she is?
Q Yes.
A I think so.
MR. WOBBROCK: All right.
Thank you, Doctor.
THE COURT: Redirect, counsel, please.
MR. PHILLIPS: Did you want to take the morning break, or do you want to proceed, Your Honor?
THE COURT: How long do you think you'll be going?
MR. PHILLIPS: It would be 15 or 20 minutes, Your Honor.
THE COURT: Do you need to get out of here?
THE WITNESS: I've got to leave at 11:00.
THE COURT: All right.
Let's take about 15 minutes right now.
MR. PHILLIPS: You want to take 15?

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THE COURT: All right. And we'll be back at 10:30.

MR. PHILLIPS: Back at 10:30.

THE COURT: All right. Let's do that.

(Jury leaves the courtroom at 10:15 a.m.)

THE COURT: You may step down, Doctor. We are out of session.

(Court was in recess at 10:16 a.m.)

(Katie Bradford reports the next session)

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STATE OF OREGON
ss.
County of Multnomah

I, Charlotte A. Powers, Official Court Reporter of the Circuit Court of the State of Oregon, Fourth Judicial District, certify that I reported in stenotype the foregoing proceedings in the above-entitled case.

I further certify that my stenotype notes were reduced to transcript form by Computer-Aided Transcription under my direction.

And I further certify that pages 2 through 82 contain a full, true, and accurate record of my stenotype notes.

Dated this 28th day of August, 2002, at Portland, Oregon.

Charlotte A. Powers, RPR, CSR
Official Court Reporter

I certify this original/duplicate is valid only if it bears my true signature and blue colored CSR seal.
Charlotte Powers

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